UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: September 14, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
ALEXANDRIA, VIRGINIA

Respondent

and Case No. WA-CA-04-0160

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring t he above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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U.S. DEPARTMENT OF AGRICULTURE FOOD AND NUTRITION SERVICE ALEXANDRIA, VIRGINIA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-04-0160

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 18, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

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PAUL B. LANG
Administrative Law Judge

Dated: September 14, 2004
Washington, DC

OALJ 04-42

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF AGRICULTURE FOOD AND NUTRITION SERVICE ALEXANDRIA, VIRGINIA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-04-0160

Gary Lieberman
For the General Counsel

Gerald W. Dolloff
For the Respondent

Wendy L. Pisman
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On January 9, 2004, the National Treasury Employees Union (Union) filed an unfair labor practice charge against the U.S. Department of Agriculture, Food and Nutrition Service, Alexandria, Virginia (Respondent or FNS). On April 15, 2004, the Regional Director of the Boston Region[1] of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116 (a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute) by terminating the employment of Rasha Kilgore, a probationary employee, because she had sought the assistance of the Union and had

[1] The case was transferred from the Washington to the Boston Region by Order dated January 13, 2004.

asserted rights under the collective bargaining agreement between the parties.

A hearing was held in Washington, DC on June 24, 2004. Each of the parties was present with counsel and was afforded the opportunity to submit evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that, on or about March 20 and July 9, 2003, Kilgore sought the assistance of the Union with regard to her right to submit a revised Maxiflex work schedule.[2] On July 14, 2003, the Respondent terminated Kilgore, ostensibly because of her unsatisfactory performance and her "unproductive" working relationship with her supervisor. The General Counsel contends that the reasons cited by the Respondent were pretexts for retaliation on account of Kilgore's assertion of her rights under the collective bargaining agreement and her consultation with the Union. Specifically, the General Counsel maintains that Robin Moffatt, who was Kilgore's immediate supervisor, resented Kilgore's challenge to her interpretation of the rules applicable to Maxiflex and her involvement of the Union.

In support of the allegations of pretextuality, the General Counsel asserts that Kilgore complied with all of Moffatt's instructions and that Moffatt complimented Kilgore on the quality of her work. Furthermore, the Respondent failed to comply with the provision of the collective bargaining agreement which requires written notice to employees of unsatisfactory performance and an opportunity to correct the deficiencies.

The General Counsel also maintains that Moffatt had an anti-union animus because the Union had previously requested that she be removed as a supervisor.

The Respondent argues that the General Counsel has failed to meet his burden of proof that Kilgore's protected activity was a significant factor in her termination. According to the Respondent, the deficiencies in Kilgore's performance and conduct are amply supported by the evidence.

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2 Maxiflex is one of several flexible work schedules which employees may follow according to the collective bargaining agreement.

Furthermore, Kilgore's termination was accomplished in accordance with the pertinent regulations. The Respondent also maintains that, while Moffatt and Kilgore might have had a strained relationship, the evidence shows that there was no anti-union animus on the part of either the Respondent or of Moffatt.

The Respondent also asserts the affirmative defenses that Kilgore's termination was justified and that she would have been terminated regardless of her protected activity.

Summary of the Evidence

The Controversy Over Kilgore's Schedule

As a member of the bargaining unit Kilgore was entitled to the benefit of provisions of the national collective bargaining agreement (GC Ex. 2) (CBA) regarding flexible work schedules. Section 20.02 of the CBA states, in pertinent part:

> (4) Flexible Work Schedule - A system of work scheduling which splits the workday into two distinct kinds of time - core hours and flexitime. An employee may choose a schedule where they report to work no later than the beginning of core hours and leave no earlier than the ending of core hours. Flexitime is the time during the workday, workweek, or pay period within the tour of duty during which an employee covered by flexitime may choose to vary his or her time of arrival to and departure from the work site consistent with their established work schedule.
>
> (a) Maxiflex Schedule - a type of flexible work schedule that contains core hours on fewer than 10 workdays in the biweekly pay period and in which a full time employee has a basic work requirement of 80 hours for the biweekly pay period, but in which an employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established.

Kilgore was also covered by the portion of the locally negotiated supplement to the CBA (GC Ex. 3) which states, in pertinent part, that:

> Core hours for employees on a maxiflex schedule will be from 10:00 AM-1:00 PM, on Tuesdays, Wednesdays and Thursdays, unless on approved leave or in a non-pay status. Any deviation from the available hours for employees on maxiflex must have supervisory approval. (GC Ex. 3, Section 20.02(1))
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> * * * *
>
> In general, a work unit is a Branch, and the 40% requirement (see Section 20.03(4)) is applied to the Branch. (GC Ex. 3, Section 20.02(6))
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> * * * *
>
> Regardless of work schedules adopted by an FNS activity, at least 40% of the employees in each work unit must be present during the core hours. The term "present" means on duty within the boundaries of the official duty station, or at an approved flexiplace location. (GC Ex. 3, Section 20.03(4))

Kilgore requested a Maxiflex schedule about three weeks after she was hired; her request was approved by Moffatt. On March 20, 2003,[3] Kilgore requested permission to change her Maxiflex schedule so that she could be off of work on the second Monday of each pay period. Moffatt initially denied the request on the grounds that another employee already had that day off and that she needed to keep a certain percentage of employees at the workplace each day. After Moffatt denied her request Kilgore came to her office and stated that, even if she were to be granted the requested day off, 75% of the Branch employees would still be at work and that this would exceed the 40% minimum required by the local supplement to the CBA.[4] Moffatt replied that the 40% figure was a minimum and that she had the authority to require that a greater percentage of employees be present so as to fulfill the responsibilities of the Branch. Moffatt then stated that she would approve the requested change to Kilgore's Maxiflex schedule, but

[3] All subsequently cited dates are in 2003.

[4] Both Kilgore and Moffatt testified that Kilgore came into Moffatt's office with a blue book that contained the CBA and the local supplement. Kilgore also testified that Moffatt expressed annoyance that Kilgore brought in the "union book".

informed her that the change was only effective until June 28 because of the need for greater coverage in order to handle the end of year work load. She also told Kilgore that the change in schedule would place an undue burden on other employees in the Branch.

On March 21, Moffatt sent an e-mail to Kilgore stating that the CBA required that proposed schedule changes were to be submitted at least ten days prior to a calendar quarter.[5] Therefore, Kilgore's new schedule could not be implemented until the pay period beginning on April 6. There was additional discussion and e-mails between Kilgore and Moffatt between March 20 and 27. The thrust of Kilgore's correspondence was a challenge to Moffatt's interpretation of the CBA. Kilgore also informed Moffatt that she had sought the advice of the Union and that the Union supported her (Kilgore's) position that the delay provided by the CBA before implementing a new "tour of duty" did not apply to a change in a Maxiflex schedule. Moffatt eventually approved Kilgore's new schedule to begin on April 6.

During the course of a staff meeting on June 24 Kilgore asked Moffatt if she needed to change her schedule. Moffatt replied that it would not be necessary. However, on July 9 Moffatt sent Kilgore an e-mail[6] stating that her current schedule had expired on June 28 and that, because she had not submitted another schedule, she was to revert to the previous schedule. Kilgore responded with an e-mail stating that she thought that the issue of the expiration of her schedule had been resolved and that she should have been advised of the impending expiration in time for her to submit a new schedule if necessary.

On July 9 Moffatt called Kilgore into her office and told her that she would have to revert to her previous schedule because she had not submitted a timely request for a schedule change. Moffatt also stated that she was not satisfied with Kilgore's performance because Kilgore had either failed to meet deadlines for the completion of her projects or had failed to inform Moffatt of delays caused by contractors. There apparently was a heated discussion at the end of which Kilgore slammed the door as she left the office. This caused a clock to fall off of the wall of

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5 The e-mail correspondence between Kilgore and Moffatt is contained in GC Ex 8.

6 The e-mail correspondence between Kilgore and Moffatt between July 9 and 11 is contained in GC Ex. 10.

Moffatt's office and also caused an employee to look out of his cubicle.[7]

Moffatt subsequently allowed Kilgore to submit a new schedule. However, Moffatt disapproved the schedule on July 11.

Kilgore's Performance

There is a significant divergence of testimony on the issue of Kilgore's performance. Kilgore testified that she was never reprimanded or counseled by Moffatt for unsatisfactory performance and that Moffatt praised her for her work during the course of an informal review. Moffatt, on the other hand, testified that she repeatedly criticized Kilgore for not meeting established deadlines and for not keeping her informed of delays caused by contractors. According to Moffatt, she advised Kilgore of those shortcomings during her first quarterly performance review.

The evidence indicates that, in spite of her testimony to the contrary, Kilgore had problems managing her deadlines and that Moffatt brought this to her attention on several occasions. This conclusion is supported by the e-mail messages between Moffatt and Kilgore and by the testimony of Moffatt, Belcher and McClyde. In an attempt to correct this problem, Moffatt directed Kilgore to begin submitting daily status reports (see GC Ex. 9). The evidence further indicates that Kilgore did not do so.[8]

Kilgore's Termination

By memorandum dated July 14 (GC Ex. 11) Rose McClyde, the Director, Accounting Division, Financial Management, and Moffatt's immediate superior, informed Kilgore that she was

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[7] Kilgore testified that Moffatt raised her voice during the meeting but that she did not. She also testified that her final words to Moffatt were, "You're something else." (Tr. 110) Moffatt testified that Kilgore raised her voice and stated that she was going to continue to take the second Monday of the pay period as a day off (Tr. 214). In view of the overall weight of the evidence, it is not necessary to resolve this conflict.

[8] Kilgore testified that she thought that the daily status reports were unnecessary because she sent Moffatt copies of all of her e-mails regarding the progress of her projects. Yet, Kilgore did not make the effort to ask Moffatt whether she still wanted the status reports.

to be terminated at the close of the business day. The stated reasons were:

> . . . your unsatisfactory performance and your unproductive working relationship with your supervisor. Specific details on these reasons are addressed in the attached e-mail. Because you have failed to make substantial progress in these areas during your employment with the Food and Nutrition Service (FNS), I deem it appropriate to terminate your employment with the FNS and from Federal service at this time.

The attachment to the memorandum is an e-mail dated July 14 from Moffatt to Cleve Hall of the Human Resources Department, McClyde and James Belcher, Deputy Administrator for Financial Management who was then McClyde's immediate superior.[9] In the e-mail Moffatt described the following incidents:

a. A meeting with Kilgore on April 2 to review her performance and to discuss applicable performance standards. According to Moffatt she advised Kilgore that she was concerned about the lack of communication as to the status of her assignments, lack of initiative, excessive "social interaction" and inadequate understanding of her assignments.

b. An inquiry to Kilgore on May 20 as to the status of her assignments. Kilgore allegedly had no idea of the status because she had not communicated with the contractors.

c. A meeting with the contractors on June 12 to discuss the plans for Kilgore's assignments which were all past due. Moffatt allegedly told Kilgore that she (Kilgore) was solely responsible for the delays in two of her assignments and was responsible for not informing Moffatt of the delays caused by contractors so that corrective action could be taken.

d. Moffatt had arranged to meet with Kilgore on May 22 to work with her on a past due assignment. Kilgore did not show up and later claimed that Moffatt was not in her office at the appointed time. Moffatt stated that this was not true.

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[9] Belcher had retired as of the time of the hearing.

e. On May 23 Moffatt asked Kilgore to provide her with daily status reports on her assignments. Kilgore submitted only one report.

In the e-mail Moffatt also stated that Kilgore had created an "adversarial relationship" with her. Moffatt asserted that Kilgore had become "contentious" when told that a particular day off was not available. Moffatt described the meeting with Kilgore when Kilgore allegedly stormed out of Moffatt's office and slammed the door while stating that, "I will take the second Monday as my day off."

Moffatt testified that the decision to terminate Kilgore, was made on July 9 when she walked out of Moffatt's office and slammed the door.[10] This, according to Moffatt, was the "last straw" (Tr. 236). Moffatt also testified that the decision to terminate Kilgore, including all necessary approvals, was made *before* the meeting of July 9. When challenged on cross-examination as to why she discussed scheduling matters with Kilgore, Moffatt responded, "Well, what was I supposed to say to her, 'Well, we're getting ready to fire you, so we really shouldn't have this discussion.'?" Moffatt asserted, in response to my question, that all necessary approvals for Kilgore's termination were in place prior to her meeting with Kilgore on July 9 (Tr. 237, 238).

Belcher testified that Moffatt approached him at some point and told him that she was having problems with an employee whose performance was unsatisfactory. Belcher told Moffatt to consult someone in the Human Resources Department for guidance, to "document everything" and to "make sure you do the right thing".[11] Belcher subsequently spoke with Hall who told him that Moffatt had consulted him.

Belcher also testified that Moffatt periodically informed him that Kilgore's performance was still

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[10] This testimony is at odds with the e-mail attachment to the termination memorandum in which Moffatt stated that the meeting had occurred on July 14. It is possible that Moffatt's reference to July 14 was either a typographical error or the result of the "pasting" of a portion of a document or message that she had drafted on July 9. Nevertheless, the Respondent has not addressed the discrepancy.

[11] It is unclear whether Moffatt initially identified Kilgore to Belcher or whether she spoke in generalities. In any event, Belcher acknowledged that he became aware of Kilgore's identity before her termination.

unsatisfactory and that she was having problems communicating with the employee. Each time Belcher told her to be sure that she was following the proper procedure. Finally, Moffatt described her meeting with Kilgore during which Kilgore slammed the door and knocked the clock off of the wall. Moffatt told Belcher that she could not take any more. Belcher replied that they would take whatever action was necessary.

At some point after Moffatt first informed Belcher of the problem he spoke to Edwin Ewell, the president of Chapter 226 of the Union.[12] Belcher emphasized that relations between the Respondent and the Union were good and that management and Union representatives regularly communicated in order to resolve problems. (Ewell also testified that the parties had generally good relations.) Belcher described the problem to Ewell in the hope that Ewell could help to resolve it. Belcher and Ewell had several conversations on the subject and, at one point, Belcher told Ewell that he could not represent Kilgore because she was a probationary employee. According to Belcher, Ewell said that he knew that.

Belcher emphasized that, although the Respondent exhausted every alternative to terminating Kilgore, the evidence justifying her termination was "overwhelming" (Tr. 251). Belcher supported the termination for which McClyde gave final approval. He also told Ewell that he was "backing the wrong horse" in challenging the termination. He did not recall whether Ewell asked him for documentation supporting the decision to terminate Kilgore.[13]

According to Belcher, the decision to terminate Kilgore was in no way influenced by the fact that she had sought the assistance of the Union. Belcher also stated that there was no anti-Union animus on the part of Respondent's management representatives and that he had never heard Moffatt say anything against the Union. Furthermore, Ewell never told him that Kilgore was the victim of anti-Union animus or that she was being penalized because she had involved the Union.

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Chapter 226 represents Respondent's employees who are assigned to headquarters. The national Union and Chapter 226 are interchangeable for the purposes of this Decision. Therefore, I will refer to both entities as the Union.

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Ewell testified that he received no supporting documentation in spite of repeated requests to Belcher (Tr. 23).

On cross-examination Belcher acknowledged that the Union had once complained that Moffatt had treated an employee unfairly. The employee thought that she deserved a higher rating on her most recent evaluation because of improvement in her performance. Moffatt told Belcher that the employee's performance had improved since the end of December, but that the evaluation was based upon her performance through December. The employee thought that the evaluation reflected her performance through April; Belcher corrected the misconception and no further action was taken. Belcher also acknowledged that Moffatt had previously been assigned to a different Branch. The transfer was not based upon a complaint by the Union, but on Belcher's analysis of conditions at the Branch. No further details were provided, either by Belcher or by other witnesses.

Belcher stated that he did not see the termination memorandum, either in final or draft form, until after it had been delivered to Kilgore. However, Moffatt and Hall had told him what would be in the memorandum. The only documentation that Belcher saw were copies of e-mails which Moffatt had sent to Kilgore or to the personnel office as well as a record of Moffatt's review of Kilgore's performance.[14] His best recollection of the performance review was that Kilgore was adequately meeting two performance elements. There might have been one element in which she was exceeding expectations and five elements in which she was not meeting expectations.

McClyde testified that she based her decision to issue the termination letter to Kilgore based upon, "Evidence from her immediate supervisor, Robin Moffatt, related to her performance and conduct" (Tr. 277). She further testified that, beginning in or around March, Moffatt periodically informed her of deficiencies in Kilgore's performance. She did not recall seeing any supporting documentation other than copies of e-mails between Moffatt and Kilgore, although she believed that Moffatt had shown her certain weekly worksheets and progress reports. McClyde stated that she met with Kilgore and told her that she might want to stop pursuing the issue of her Maxiflex schedule because she was a probationary employee and was in danger of being fired (Tr. 280).

Gail Brown, the Secretary of the Union, also reported to Moffatt. Brown testified that, in or around March,

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[14] The record of the performance review was not offered into evidence by either party. No adverse inference will be drawn from the absence of this evidence since it was equally available to each of the parties.

Kilgore consulted her about her Maxiflex schedule. Brown gave Kilgore a copy of the local supplement to the CBA and advised her to talk with Verne Whitaker, an Area Vice President of the Union, and with Patricia Maggi, the Secretary of the Union. In or around the last week of April, Moffatt called Brown into her office and asked her if she was the Union representative who was talking to Kilgore. When Brown told her that she was one of them, Moffatt said, "I am so angry with her. Doesn't she know that I could fire her?" Brown further testified that Moffatt did not mention Kilgore's performance, but only alluded to the issue of her Maxiflex schedule (Tr. 192).

Each of the parties submitted extensive evidence concerning Kilgore's work assignments as well as the quality of her work. In view of the timing of Kilgore's termination and of the evidence as to the Respondent's motivation, I do not deem it necessary to describe that evidence in detail.

Findings of Fact

The following findings of fact are based upon the pleadings and the evidence as summarized above:

1. The Respondent is an "agency" as defined in §7103 (a)(3) of the Statute. The Union is a "labor organization" as defined in §7103(a)(4) of the Statute and is the certified representative of a unit of the Respondent's employees which is appropriate for collective bargaining.

2. At all times pertinent to this case Kilgore was a probationary employee of the Respondent and a member of the bargaining unit represented by the Union.

3. Kilgore was an "employee" as defined in §7103(a)(2) (A) of the Statute.

4. The Respondent is charged with the responsibility of administering various federal food and nutrition programs such as food stamps, school lunch and surplus food distribution.

5. On November 3, 2002,Kilgore was hired by the Respondent as a Systems Accountant in the Accounting Division, Financial Systems Branch. Moffatt was the Branch Chief and Kilgore's immediate supervisor.

6. The CBA and the local supplement entitle employees to elect Maxiflex schedules with the approval of their supervisors.

7. Kilgore first requested a Maxiflex schedule in or around November of 2002; Moffatt approved the request.

8. On March 20 Kilgore requested permission to change her Maxiflex schedule to include a day off on the second Monday of each pay period. Moffatt initially denied the request on the ground that the proposed schedule would leave the Branch short-handed. Kilgore referred to the CBA and told Moffatt that there would still be more than 40% of the employees present if her new schedule were approved. Moffatt eventually approved the schedule, but stated that, in accordance with the CBA, it would not go into effect until the pay period beginning on April 6. The schedule was to remain in effect through June 28.

9. Kilgore informed Moffatt that she had consulted the Union and that the Union had confirmed that Moffatt's interpretation of the CBA was incorrect with regard to the necessity of delaying the implementation of her new schedule.

10. On July 9 Moffatt called Kilgore into her office and informed her that her current schedule had expired on June 28 and that she would have to revert to her previous schedule that did not allow for a day off on the second Monday of each pay period. Kilgore questioned the decision and, after further heated discussion, left the office. As Kilgore left she slammed the door, causing a clock to fall off of the wall and an employee to look out of an adjoining cubicle.

11. After the meeting with Kilgore, Moffatt told Belcher that she "could not take any more" and recommended that Kilgore be terminated.

12. The decision to terminate Kilgore was not made until after the meeting of July 9.

In making this finding, I do not credit Moffatt's testimony that the decision to terminate Kilgore was made before the meeting. That testimony is not plausible for several reasons. In the first place, Moffatt's explanation of her reason for initiating the meeting with Kilgore on July 9 is extremely far-fetched. It simply makes no sense for Moffatt to have sought out Kilgore with regard to a scheduling issue that would have been moot if Moffatt had known that Kilgore was to be terminated in the near future. Furthermore, the proposition that the decision to terminate Kilgore was made before the July 9 meeting is inconsistent with Moffatt's own testimony that Kilgore's conduct at the meeting of July 9 was the "last straw". Both Belcher and

McClyde mentioned the door slamming incident as one of the reasons for Kilgore's termination. Finally, and most significantly, the termination letter of July 14 incorporated Moffatt's e-mail of the same date which cited the July 9 meeting, as well as previous disputes concerning Kilgore's schedule, in support of Moffatt's contention that Kilgore had created an "adversarial relationship" with her.

13. Kilgore would not have been terminated if she had not consulted the Union and continued to assert her rights under the CBA.

The overall weight of the evidence is that there were continuing problems with Kilgore's performance. Kilgore's major problems were her failure to meet deadlines for the completion of the projects assigned to her and her failure to keep Moffatt advised of delays which were caused by contractors. Moffatt repeatedly questioned her about the progress of her projects and eventually directed her to submit daily status reports. The evidence also suggests that Kilgore had a tendency to continually question Moffatt's decisions. For example, she asked Moffatt if other employees were required to submit daily status reports.

Kilgore's problems, if uncorrected, might eventually have led to her termination before the end of her probationary period. However, the evidence clearly shows that Kilgore would not have been terminated on July 14 had she and the Union not continued to maintain that Moffatt was relying on an incorrect interpretation of the CBA. This conclusion is confirmed by Moffatt's statement to Brown about her authority to fire Kilgore and by McClyde's advice to Kilgore to stop pushing the scheduling issue because she could be fired while she was still on probation.

Both Ewell and Belcher testified that there was a generally good relationship between the Respondent and the Union and that Moffatt never expressed anti-Union sentiment. Nevertheless, Moffatt clearly resented Kilgore's persistence in pursuing what she considered to be her rights under the CBA and in seeking the assistance of the Union. That resentment, along with her anger over the door-slamming incident, caused Moffatt to initiate action leading to

Kilgore's termination.[15] Moffatt's recommendation was accepted by Belcher, McClyde and Hall, all of whom, along with Moffatt, acted on behalf of the Respondent.

Analysis and Conclusions

The Controlling Law

In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*) the Authority established the order of proof in a case which is based upon retaliation for protected activity in violation of §7116(a)(2) of the Statute. In order to establish a *prima facie* case the General Counsel bears the burden of proving that the alleged victim of discrimination was engaged in a protected activity and that the protected activity was a motivating factor in the discriminatory treatment by the agency. Once the General Counsel has presented a *prima facie* case[16] the agency may present an affirmative defense (for which it bears the burden of proof) that its action was justified and that it would have taken the action in the absence of the protected activity, *Warner Robins*.

The Nature of Kilgore's Activity

In asserting her rights under the CBA, Kilgore was engaged in protected activity within the meaning of §7102 of the Statute, *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1039 (1992). This was true even though she was not an officer or other representative of the Union, *United States Department of the Air Force, Aerospace Maintenance and*

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[15] Nothing in this Decision should be construed as condoning Kilgore's conduct in Moffatt's office on July 9. The thrust of my factual findings is simply that, while Kilgore might have received some lesser form of discipline for her conduct on July 9, Moffatt would not have urged her termination were it not for her consultation with the Union and her challenges to Moffatt's actions with regard to her scheduling requests.

[16] The Administrative Law Judge is to consider the record as a whole, including the evidence submitted by the agency, in determining whether the General Counsel has presented a *prima facie* case, *Department of the Air Force, Air Force Materiel Command Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000) (*Warner Robins*). Thus, the agency may attempt to refute the General Counsel's case and present an affirmative defense.

Regeneration Center, Davis Monthan Air Force Base, Tucson, Arizona, 58 FLRA 636, 645 (2003) (*Davis Monthan*).

Although Kilgore's presence at the meeting of July 9 might not have been protected activity, it had an undeniable connection to the contractual dispute concerning her Maxiflex schedule. In any event, the issue is not crucial to the disposition of this case. In her testimony Moffatt described the incident as the "last straw"; her e-mail of July 14, which was attached to the termination memorandum of the same date, impliedly characterized the meeting as the culmination of their "adversarial relationship" which Kilgore had allegedly created. Moffatt was obviously referring to the Kilgore's challenge to her scheduling decisions. For the reasons already stated, that challenge was protected activity which had begun well before the meeting of July 9. Assuming the "worst case scenario", *i.e.*, that Kilgore raised her voice, told Moffatt that she would continue to take a day off on the second Monday of each pay period and slammed the office door, her conduct at the meeting, by the Respondent's own contention, was no more than a contributing factor to her termination. In other words, Kilgore's termination was not based solely upon her conduct on July 9.

Kilgore's Status

The Respondent has cited Kilgore's status as a probationary employee in a competitive position in support of the proposition that she could be fired if she failed to demonstrate her qualifications for continued employment. This is true up to a point. In *U.S. Dept. of Justice, Immigration and Naturalization Service v. F.L.R.A.*, 700 F.2d 724, 725 (D.C. Cir. 1983) (*INS*) the court recognized that, in passing the Civil Service Reform Act of 1978, Congress, "reaffirmed its unwillingness to provide statutory protection for probationary employees being terminated for unacceptable performance". In light of the holding in *INS* the Authority has declared that the summary termination of a probationary employee is an essential element of an agency's right to hire employees pursuant to §7106(a)(2)(A) of the Statute, *Service Employees' International Union,*

Local 556, AFL-CIO and Department of the Navy, Marine Corps Exchange, Kaneohe Bay, Hawaii, 26 FLRA 801 (1987).[17]

In spite of the special status of probationary employees, the Statute does not preclude their coverage under collective bargaining agreements, *U.S. Department of the Air Force, Nellis Air Force Base, Las Vegas, Nevada*, 46 FLRA 1323, 1325 (1993). Moreover, the Statute does not curtail the right of probationary employees to engage in union activity, *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 42 FLRA 22, 54 (1991). The Respondent does not dispute the proposition that Kilgore was an "employee" within the meaning of §7103(a)(2) of the Statute and was thereby entitled to its protection (GC Ex. 1(f)).

The Respondent has correctly referred to the OPM regulations set forth in 5 C.F.R. §315 as establishing its right to exercise broad discretion in terminating probationary employees. 5 C.F.R. §315.804(a), a regulation specifically cited by the Respondent, requires that, when an agency elects to terminate a probationary employee because of performance or conduct,

[17] The General Counsel has cited Article 9.04(6) of the CBA which requires that employees be given written notice of performance deficiencies during the course of periodic reviews as well as notice of the consequences of a failure to improve. The General Counsel's reliance on the cited provision of the CBA is unwarranted. In *American Federation of Government Employees, AFL-CIO, Local 1625 and Department of the Navy, Naval Air Station, Oceana, Virginia*, 30 FLRA 1105, 1107 (1988) (*Oceana*) the Authority, in reliance on *INS*, held that such a provision cannot lawfully be applied to probationary employees. In so holding, the Authority cited the language of *Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local 1923, AFL-CIO*, 15 FLRA 714 (1984) that:

> . . . in enacting the Statute, Congress did not intend that procedural protections for probationary employees be established through collective bargaining under the Statute (*Id.* at 715).

In *Oceana* the Authority also recognized that, in accordance with the holding in *INS*, the regulations of the Office of Personnel Management (OPM) are the sole source of procedural protections for probationary employees.

> . . . it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

The termination memorandum of July 14 was obviously intended to conform to the OPM regulation and it does so. Therefore, the Respondent is bound by the specific reasons which are set forth in Kilgore's termination memorandum. In that memorandum the Respondent, through McClyde and Moffatt, stated that Kilgore's termination was the result of the perceived inadequacies of Kilgore's conduct and of the unsatisfactory quality of her work.

The Grounds for Kilgore's Termination

The testimony of the Respondent's own witnesses, as well as the evidence as a whole, indicates that Kilgore would not have been terminated if she had not created an adversarial relationship with Moffatt. The clear import of that testimony, as well as of the termination memorandum of July 14, is that Kilgore's conduct was a major, and probably a decisive, factor in the Respondent's decision to terminate her. The only evidence of Kilgore's alleged misconduct, other than on July 9, concerned her activity with regard to her Maxiflex schedule.[18]

The Respondent has relied upon certain provisions of the CBA and the local supplement to show that Moffatt was authorized to disapprove Kilgore's Maxiflex schedule upon a determination that Kilgore's presence was necessary for the Branch to function effectively. While that may be so, the merits of the underlying dispute as to the meaning of the CBA have no effect on Kilgore's right to pursue what she considered to be her contractual rights.[19] Kilgore and the Union were entitled to have the issue resolved, if necessary, through the contractual grievance procedure.

[18] Kilgore testified that, at her performance review, Moffatt told her to cut down on her socializing. The Respondent has not alleged that this was a contributing factor to the decision to terminate her.

[19] This is not to say that Kilgore would have been free to shirk work or to disrupt the work environment while in pursuit of her rights. However, it has not been alleged that this occurred.

They were prevented from doing so when the Respondent terminated Kilgore.

The Respondent has also pointed to the fact that two of Kilgore's co-workers, Quantwana Hobson and Marquette Screen, testified that Moffatt treated all probationary employees alike.

The simple answer to this contention is that no other probationary employee challenged Moffatt as did Kilgore.[20]

As the Respondent contends, the evidence shows that the Union and the Respondent had generally good relations and that Moffatt was never known to have exhibited anti-Union animus. However, the General Counsel's case does not depend on proof that either the Respondent or Moffatt acted out of general antipathy toward the Union. It is sufficient that the General Counsel has shown that the Respondent, through its management representatives, based Kilgore's termination, at least in part, on the fact that she had been engaged in protected activity. That showing is all that is required for a *prima facie* case under *Letterkenny* and its progeny.

The Respondent's Affirmative Defenses

In order for the Respondent to show that Kilgore's termination was justified it must prove, by a preponderance of the evidence, that her actions while engaged in protected activity amounted to flagrant misconduct or that they otherwise exceeded the boundaries of protected activity, *Davis Monthan*.

The evaluation of allegedly flagrant misconduct depends upon the facts of each case, *Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 81 (1985). The evidence shows that Kilgore's challenge to Moffatt's scheduling decisions fell far short of conduct which, in the words of the court in *Dreiser & Krump Mfg. Co., Inc. v. N.L.R.B.*, 544 F.2d 320, 329 (7th

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Hobson testified that Moffatt told her that she would prefer that employees not work a Maxiflex schedule because of the work load (Tr. 171). Hobson also testified that she would be afraid to consult the Union because of fear of retaliation and that Kilgore was the first employee to work a Maxiflex schedule (Tr. 178).

Screen testified that he did not challenge Moffatt's scheduling decisions because he "didn't want to push her buttons" (Tr. 188).

Cir. 1976)[21] is "so violent or of such serious character as to render the employee unfit for further service". Nor has the Respondent shown that Kilgore's conduct exceeded the boundaries of protected activity for any other reason.

The Respondent contends that Kilgore's protected activity was not a significant factor in the decision to terminate her and that it would have made the same decision in the absence of the protected activity.[22] As shown above, that contention is belied by the testimony of the Respondent's own witnesses and by McClyde's memorandum of July 14 to Kilgore. The Respondent is saying in effect that, because it has broad discretion to terminate a probationary employee for poor performance, the Authority should ignore evidence of the employee's protected activity and its effect on the Respondent's decision. That argument, taken to its logical conclusion, would remove probationary employees from the protection of the Statute, a result which is contrary to the consistent interpretation of the Statute by the Authority. As stated in *Indian Health Service, Crow Hospital, Crow Agency, Montana*, 57 FLRA 109, 114 (2001), "The fact that probationary employees can be terminated without cause does not permit the Respondent to terminate them in violation of the Statute."

The Respondent has not effectively rebutted the *prima facie* case presented by the General Counsel and has failed to support its burden of proof as to its affirmative defenses. Accordingly, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (2) of the Statute by terminating the employment of Rasha Kilgore. I therefore recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41 of the Rules and Regulations of the Federal Labor Relations Authority (Authority) and §7118 of the Federal Service Labor-Management Relations Statute

[21] Cited with approval in *U.S. Department of Veterans Affairs Medical Center, Jamaica Plain, Massachusetts*, 50 FLRA 583, 587 (1995).

[22] Strictly speaking, it is not necessary to address this issue in view of the fact that the Respondent has failed to show that it had a legitimate reason for terminating Kilgore, *Davis Monthan*, 58 FLRA at 637, n.2.

(Statute), it is hereby ordered that the U.S. Department of Agriculture, Food and Nutrition Service, Alexandria, Virginia (Respondent), shall:

1. Cease and desist from:

(a) Terminating or otherwise discriminating against its bargaining unit employees, including probationary employees, because they have sought the assistance of the National Treasury Employees Union (Union) or because they have asserted rights under the collective bargaining agreement between the Respondent and the Union.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Offer Rasha Kilgore immediate and full reinstatement to her former position as a Systems Accountant, GS-510-07, in the Accounting Division, Financial Policy and Systems Branch, or a substantially equivalent position, without prejudice to her seniority and other rights.

(b) In accordance with the Back Pay Act, 5 U.S.C. §5596(b), make Rasha Kilgore whole for any loss of pay, allowances or differentials which she normally would have earned had she not been terminated, less any amounts earned through other employment, plus interest.

(c) Post at its headquarters facility at Alexandria, Virginia where bargaining unit employees represented by the Union are located copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Administrator of the Respondent and shall be posted and maintained for 60 days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(d) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Boston Region of the Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 14, 2004

Paul B. Lang
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Agriculture, Food and Nutrition Service, Alexandria, Virginia violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT terminate or otherwise discriminate against our bargaining unit employees, including probationary employees, because they have sought the assistance of the National Treasury Employees Union or because they have asserted rights under our collective bargaining agreement with the National Treasury Employees Union.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL offer Rasha Kilgore immediate and full reinstatement to her former position as a Systems Accountant, GS-510-07, in the Accounting Division, Financial Policy and Systems Branch, or a substantially equivalent position, without prejudice to her seniority and other rights.

WE WILL, in accordance with the Back Pay Act, 5 U.S.C. §5596 (b), make Rasha Kilgore whole for any loss of pay, allowances or differentials which she normally would have earned had she not been terminated, less any amounts earned through other employment, plus interest.

_____
(Agency)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, whose address is: Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, MA 02110-1200, and whose telephone number is: 617-424-5731.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-04-0160 were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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Dated: September 14, 2004
Washington, DC